Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

HECTOR L. HUERTAS,

Petitioner,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA,
SUN BANCORP., INC.

Respondents.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court found pro-se Petitioner, a police-brutality victim wrongfully accused of bank robbery in a civil conspiracy claim, acted with "the 'type of willful or contumacious behavior that can be characterized as acting in flagrant bad faith' " when he did not attend five noticed depositions. The Court of Appeals found "It is not so clear that [Petitioner's] conduct was willful as defined by this Court." The questions presented are:

1. Whether the Due Process Clause of 5th Amendment is violated by the dismissal of an action under the 3rd Circuit's "*Poulis* Balance" for failure to comply with a discovery order, which failure need not show "willfulness"(as the D.R.I. and Federal, D.C. Circuits hold, and cited by the 7th, 8th, 11th Circuits), or

2. Whether a showing of "willfulness or flagrant bad faith" as opposed to *inability* to comply with a discovery order, is a condition for dismissal under Fed.R.Civ.P Rule 37(b) (as the 2nd,4th,5th , 6th Circuits hold). *See* Societe Internationale v. Rogers, 357 U.S. 197 (1958).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., *infra*, 3-7) [1] is unreported. The opinion of the district court (Pet. App., *infra*, 8-22), which was incorporated in its Memorandum and Order granting respondents' motion to dismiss, with prejudice, is unreported.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on July 19, 2005. The Court of Appeals' majority denied a timely petition for rehearing and rehearing en banc on September 7, 2005 (Pet. App., *infra*, 1-2), which was filed on July 31, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) to resolve circuit court splits.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions for default judgment under Federal Rules Of Civil Procedure Rule 37 that are here involved must be read in light of the provisions of the Due Process Clause Of The Fifth Amendment that no person shall be deprived of property without due process of law.

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[1] The designation "Pet. App.,*infra*, xx" also refers to critical portions of the record also added to pages in the attached Appendix.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1332, 1343 (a)(1) and (3) because the civil action arose pursuant to 42 U.S.C. § 1983 and the subsequent civil conspiracy claim under 42 U.S.C. § 1985.

This case raises important, recurring questions relating to the efforts of partys to preserve their Fifth Amendment rights against deprivation of property without due process of law and the meaning of this Court's fractured decision in Societe Internationale v. Rogers, 357 U.S. 197, (1958) *citing* Hovey v. Elliott, 167 U.S. 409 (1897). This decision also raises important questions as to the proper application of the Federal Rules of Civil Procedure. *See* Schlagenhauf v. Holder, 379 U.S. 104, 112 (1964) *citing* McCullough v. Cosgrave, 309 U.S. 634 (1940).

A. The Advisory Committee Notes of Federal Rules Of Civil Procedure Rule 37 Amendments

In Societe Internationale 357 U.S., this Court interpreted the provisions of Rule 37 and noted they must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law. Additionally, and more particularly, against decisions establishing that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. This Court concluded that Rule 37 should not be construed to authorize dismissal of the complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault

of petitioner. However, that opinion has engendered widespread conflict and confusion in the lower courts, as reflected in the decisions below.

The Rule 37 Advisory Committee's Note-1970 broadened the permissible sanctions to include such orders "as are just"; and the requirement that the failure to appear or respond be "willful" was eliminated. Even so, "willfulness" continues to play a role, along with various other factors, in the choice of sanctions. Alternatively, after the decision in Societe, the courts have ruled that "refusal" requires willfulness. Hinson v. Michigan Mutual Liability Co., 275 F.2d 537 (5th Cir. 1960). In addition, the courts have reiterated the "willfulness and bad faith" requirements held in Societe. *See* Mutual Federal Savings and Loan Association v. Richards and Associates, Inc., 872 F.2d 88 (4th Cir. 1989) [2]. The Circuit Courts have also held that Rule 37 must be strictly construed. *See* Estrada v. Rowland, 69 F.3d 405, 406 (9th Cir. 1995). In fact, even though Rule 37(d) in terms provides for three severe sanctions, the courts have interpreted it as permitting softer sanctions than those that it sets forth. E.g. Gill v. Stolow, 240 F.2d 669 (2nd Cir. 1957); *See also* Mutual Federal Savings and Loan Association, 872 F.2d at 92 (When default sanctions involved, court's discretion narrowed by right to jury trial and fair day in court). For example, if default is precipitated by counsel's ignorance of Federal practice, cf. Dunn v. Pa. R.R., 96 F.Supp. 597 (N.D. Ohio 1951), or by his preoccupation with another aspect of the case, cf. Maurer-Neuer, Inc v. United Packinghouse Workers, 26 F.R.D. 139 (D. Kansas 1960), dismissal of the action and default judgment are not justified, but imposition of expenses and fees may well be.

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[2] *citing* at p.92 Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 503-04 (4th Cir. 1977)

B. The proceedings in the District Court for the Eastern District of Pennsylvania

Petitioner filed suit pro-se on October 18, 2002 against the City of Philadelphia and Sun Bancorp, 02-cv-7955. Petitioner fully complied with requests for production and interrogatories propounded on and only on November 12, 2002 (C.A. Brief p.3) [3]. Nevertheless, a motion to Dismiss pursuant to Rule 37 was filed by Sun Bancorp., Inc. and jointly on behalf of the City of Philadelphia the day after the scheduled deposition of November 4, 2004, which the Petitioner attended (C.A. Brief p.2-5). On January 31, 2005, the District Court granted the Motion to Dismiss holding that although Petitioner's "claim would withstand a motion to dismiss, the first five *Poulis* factors **weigh heavily** in favor of dismissal" (Pet. App.,*infra*, 21). The district court followed the Third Circuit's contradictory and renown progeny to Societe, i.e. the "*Poulis* Balance". Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863 (3rd Cir. 1984). The district court then ordered the remaining discovery and dispositive motions, that were filed by Petitioner and Respondents, as moot (C.A. Brief p.7). The desired result intended by the Third Circuit's "Poulis *Balance*" is, as the district court explained,

> The Poulis test is not a "mechanical calculation" for deciding whether to dismiss a plaintiff's complaint. See Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992). Also, it is not necessary that all of the Poulis factors are satisfied to justify dismissal of the claim. See id. Deciding whether to dismiss the action under

[3] The designation "C.A. Brief p.x" refers to critical portions of the record within Petitioner's Brief and Appendix filed in the Third Circuit Court on April 22, 2005.

> Poulis requires a balancing of the factors in the "context of the district court's extended contact with the litigant." Id. The Court will evaluate Plaintiff's actions under each of the six Poulis factors to determine whether to dismiss Plaintiff's claim (Pet. App,*infra*, 13).

Petitioner Hector L Huertas timely appealed. The Court of Appeals overruled the district court and held that that court improperly defined Petitioner's conduct to be willful, *infra*. Even so, a divided panel affirmed such dismissal, with prejudice, because "In determining whether the district court abused its discretion, 'we will be guided by the manner in which the court balanced the Poulis factors and whether the record supports its findings.' Ali v. Sims, 788 F.2d 954, 957 (3rd Cir. 1986)" (Pet. App.,*infra*, 5). This was in spite of the fact the Third Circuit agreed with the Petitioner's argument in that he did not intend to prevent the Defendants from pursuing their defense and that Petitioner's conduct was not designed to be "strategic or self-serving" (Pet. App.,*infra*, 6).

C. The Court of Appeals' Decision

A divided panel of the court of appeals affirmed the district court's dismissal, with prejudice (Pet. App.,*infra*, 2,7). The majority of the circuit judges denied the petition for rehearing en banc and thus reaffirmed the Third Circuit's holding in Poulis 747 F.2d, supra. This is the general area of the law and the central issue of the instant appeal. *Poulis* is a contradictory progeny to this Court's opinion in Societe, which held,

> "Rule 37 should not be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply

> has been due to [I]*inability*, and not to [1] willfulness, [2] bad faith, or [3] any fault of petitioner" Societe Internationale, 357 U.S. at 212, supra.

As the Third Circuit Court of Appeals held in its opinion of the instant appeal (Pet. App., *infra*, 6),

> With respect to [2]bad faith or [1]willfulness, [Plaintiff] argues that his fear of heights and back injury [3][I]prevented him from attending his depositions, and that his lack of attendance was not designed to prevent the defense from taking his deposition. It is not so clear that [Plaintiff's] conduct was [1]willful as defined by this Court. [Citations omitted]. . . However, this does not show that [Plaintiff's] conduct was designed to be "strategic or self serving," an inference usually required for a finding of [1]willfulness. . . Accordingly, we will affirm.

That is to say, the Third Circuit Court of Appeals has eliminated "willfulness or flagrant bad faith" as a condition in its decisions to affirm a District Court's dismissal, with prejudice, of a civil action in accordance to its holding in *Poulis*. Further, the "Third Circuit Poulis *Balance*" does not cite "willfulness or flagrant bad faith" as opposed to *inability* as a condition for dismissing a case. In fact, the Third Circuit has found that not all of the "*Poulis* factors" need to be satisfied to justify dismissal of a case, with prejudice (Pet. App., *infra*, 7, 13). The "Third Circuit Poulis factors" are:

> In exercising the appellate function to determine whether the trial court has abused its discretion in dismissing or refusing to lift a default, an appellate court is guided by the manner in which the trial court balances the following factors, which have been